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## Injury to Reputation and the Constitution: Confusion Amid Conflicting Approaches

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# INJURY TO REPUTATION AND THE CONSTITUTION: CONFUSION AMID CONFLICTING APPROACHES

George C. Christie\*

## I. INTRODUCTION

On March 2, 1976, the Supreme Court handed down its decision in *Time, Inc. v. Firestone*.<sup>1</sup> Like most of the Court's recent pronouncements in the area of defamation, this decision left the law more, rather than less, confused. In *Firestone*, the Court concluded that the plaintiff in a defamation action—the wife of a member of a prominent American family—was not a public figure and that her highly publicized divorce trial was not a public controversy.<sup>2</sup> This decision ostensibly continued the erosion of protections afforded the defendant under the doctrine of *New York Times Co. v. Sullivan*,<sup>3</sup> a process that had commenced almost two years earlier in *Gertz v. Robert Welch, Inc.*<sup>4</sup> The Court's decision in *Firestone*, however, was grounded on reasons that may, in the long run, actually restrict the ability of plaintiffs to bring actions for defamation.

Less than three weeks after its *Firestone* decision, the Court handed down *Paul v. Davis*,<sup>5</sup> a decision that, although not in the *Sullivan* line of cases, may ultimately have great influence on the law of defamation. Davis, a newspaper photographer, had initiated a class action in federal district court on the basis of 42 U.S.C. § 1983 (civil action for deprivation of rights under color of state law) and the fourteenth amendment, against the police chiefs of Louisville, Kentucky, and of Jefferson County, Kentucky; he sought damages, as well as declaratory and injunctive relief. The gravamen of Davis' complaint was that defendants had included his picture and name in a flyer, distributed to merchants, that purported to identify persons who "have been arrested during 1971 or 1972 or have been active in various criminal fields in high density shopping areas."<sup>6</sup> Each

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1. 424 U.S. 448 (1976).

2. See text at notes 62-71 *infra*.

3. 376 U.S. 254 (1964).

4. 418 U.S. 323 (1974).

5. 424 U.S. 693 (1976).

6. 424 U.S. at 695.

of the five pages of the flyer had at the top in large capital letters the following notation:

NOVEMBER 1972  
CITY OF LOUISVILLE  
JEFFERSON COUNTY  
POLICE DEPARTMENTS  
ACTIVE SHOPLIFTERS<sup>7</sup>

Davis' picture and name were included in the flyer because he had been charged with shoplifting and arrested in June 1971 by a store's private security police. At his arraignment in September 1971, Davis had pleaded not guilty. The charge against him had then been "filed away with leave [to reinstate]," which, under Kentucky law, meant that it was still pending.<sup>8</sup> Shortly after the circulation of the flyer in late 1972, the charge was dismissed by a judge of the Louisville police court.<sup>9</sup>

The action against the two police chiefs was dismissed by the district court on the ground that Davis had failed to establish that he had "been deprived of any right secured to him by the Constitution of the United States."<sup>10</sup> The Court of Appeals for the Sixth Circuit reversed<sup>11</sup> on the basis of the Supreme Court's decision in *Wisconsin v. Constantineau*,<sup>12</sup> which had found the "posting" of an individual as an excessive drinker to be unconstitutional. The Supreme Court, in turn, reversed with an opinion written by Justice Rehnquist, who had also been the author of the Court's opinion in *Firestone*. Justice Rehnquist held that defendant police chiefs' interference merely with Davis' interest in his reputation was not actionable under section 1983 and the fourteenth amendment. At most, in the Court's view, plaintiff had alleged a claim, under state law, of tortious defamation by state officials. Section 1983 and the fourteenth amendment did not make every tort by state officials a deprivation of rights secured under the fourteenth amendment. The Court distinguished *Wisconsin v. Constantineau* on the ground that more had been at stake in that case than mere reputation. Not only had Constantineau been "posted" as an excessive drinker, but the fact of posting made it unlawful for proprietors of liquor stores and taverns who had notice of the posting to sell liquor to her.<sup>13</sup>

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7. 424 U.S. at 695.

8. 424 U.S. at 695-96. Keeping the charge alive under these circumstances would appear to be the type of conduct proscribed by *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

9. 424 U.S. at 696.

10. 424 U.S. at 696.

11. 424 U.S. at 696-97.

12. See *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

13. 424 U.S. at 707-09.

Whatever the merits of the Court's decision in *Paul v. Davis*, of which more will be said later,<sup>14</sup> the decision obviously has important implications for the law of defamation, especially in the context of actions against public officials. This article will focus on these implications in light of the Court's recent treatment of the subject of defamation, of which the *Firestone* decision is the latest example. In this regard, it is important to recall that the Court, in *Sullivan*,<sup>15</sup> relied heavily on *Barr v. Matteo*,<sup>16</sup> which had granted an absolute privilege to almost anything that a federal official might say within the outer perimeter of his duty. The Court, in *Sullivan*, observed that this doctrine severely restricted the ability of private individuals to succeed in a defamation action against federal officials. It further noted that most states granted a similar privilege to high-ranking officials, with at least a qualified privilege for lesser functionaries.<sup>17</sup> Accordingly, the Court reasoned in *Sullivan*, it should not be possible for a public official to bring an action against a private citizen under conditions where the private citizen would have no action against the public official. Yet now, in *Paul v. Davis*, the Court has apparently attempted to justify its refusal to recognize a constitutionally based remedy against public officials by leaving the impression that plaintiffs like Davis may have an action for defamation against public officials, despite *Barr v. Matteo* and the comparable state court cases. To say the least, this seems puzzling. If, in fact, the premise of the Court's decision in *Paul v. Davis* was actually that a private citizen neither has nor should have any tort remedy for damage to his reputation caused by the false statements of public officials—and this certainly seems to be the actual result of its decision—the Court should have candidly said so.

It is the thesis of this article that the long-run implications of *Firestone* and *Paul v. Davis* will force a radical reformulation of the circumstances under which an individual may obtain legal redress for injury to his reputation brought about by falsehoods. The Court will eventually be obliged to abandon its fragmented treatment of the subject: At present, some injured persons have no chance of recovery; others are faced with requirements of proof that make recovery very difficult; still others can recover under significantly more relaxed standards of proof. The nature of the Court's likely reformulation will be developed later in this article, after an examination of the unsatisfactory current state of the law.

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14. See text at notes 92-95 *infra*.

15. 376 U.S. 254, 282 (1964).

16. 360 U.S. 564 (1959).

17. 376 U.S. at 282.

## II. DEFAMATION AND THE COURT, 1964-1976<sup>18</sup>

### A. New York Times Company v. Sullivan to Rosenbloom

The years immediately following the Court's seminal decision in *Sullivan*<sup>19</sup> witnessed a relatively orderly and steady expansion of the reach of that case. There the Court had held that, at least with respect to the nonprivate aspects of their lives, public officials could not successfully bring actions for defamation without a showing of "malice" in the constitutional sense, defined to be either deliberate falsehood or reckless disregard for the truth. Common-law malice, which could be established by proof of ill will toward the plaintiff or a desire to hurt him, was not enough.<sup>20</sup> Furthermore, as the Court several times made clear, "recklessness" could be proven only by some showing of conscious indifference to truth; a mere failure to investigate was insufficient.<sup>21</sup> Although there could not have been much doubt as to how it would decide the issue, the Court soon held that the same strictures applied to prosecutions under state criminal libel laws.<sup>22</sup>

In the 1966 case of *Rosenblatt v. Baer*,<sup>23</sup> the Court moved forward to the position that the constitutional privilege enunciated in *Sullivan* applied in actions for defamation brought by relatively low-ranking public officials or former public officials, at least when the actions were based on statements about their official conduct. Indeed, after *Rosenblatt*, the *Sullivan* standards seemed to apply to any public employee, however minor his position, so long as the challenged statements concerned official conduct. The next year, in *Curtis Publishing Co. v. Butts*<sup>24</sup> and *Associated Press v. Walker*,<sup>25</sup> the Court followed the lead of some lower courts and extended the privilege to statements concerning at least the nonprivate aspects of

18. I am proceeding under the assumption that many readers have some familiarity with this history. The truncated summary presented below is what is necessary as background for my discussion of *Firestone* and *Paul v. Davis* and the radical changes in the law that will be required to reconcile these cases to each other and to the prior legal development. For a more detailed survey of the Court's work-product up through the *Gertz* case in 1974, as well as for a discussion of some of the lower court decisions, see Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analogical Primer*, 61 VA. L. REV. 1349 (1975).

19. 376 U.S. 254 (1964).

20. See *Greenbelt Coop. Pub. Assn. v. Bresler*, 398 U.S. 6, 9-10 (1970); *Rosenblatt v. Baer*, 383 U.S. 75, 83-84 (1966); *Garrison v. Louisiana*, 379 U.S. 64, 77-79 (1964).

21. See *St. Amant v. Thompson*, 390 U.S. 727, 731-33 (1968); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967) (per curiam).

22. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

23. 383 U.S. 75 (1966).

24. 388 U.S. 130 (1967).

25. 388 U.S. 130 (1967) (reported *sub nom.* *Curtis Publishing Co. v. Butts*).

the lives of public figures, even those who were not involved in politics. Justice Harlan's suggestion<sup>26</sup> in the *Butts* and *Walker* cases that public figures who were not public officials might be able to overcome the privilege upon a showing of only gross negligence created some uncertainty, but he later abandoned that position.<sup>27</sup> During the same term that *Butts* and *Walker* were decided, the Court further indicated that a relatively unknown person could, by accidental involvement in an event of major newsworthiness, become a public figure, at least with regard to matters concerning the newsworthy event.<sup>28</sup>

Finally, in *Rosenbloom v. Metromedia, Inc.*,<sup>29</sup> decided in 1971, the Court applied the privilege in an action brought by one who was hardly a public figure but who had become involved in a minor newsworthy event; specifically, he had been arrested for selling allegedly obscene literature. There was no majority opinion, but Justice Brennan's plurality opinion seemed to presage the future. Discussion of newsworthy events was said to be constitutionally protected, and, at least when the defendant was one of the news media, the Court seemed hesitant to second-guess the defendant's conclusion that the event in question was newsworthy. It is true that some fairly novel positions were advanced in the dissents. For example, Justices Harlan, Marshall, and Stewart argued that presumed damages should no longer be allowed in any action for defamation.<sup>30</sup> Justice Marshall, in an opinion joined by Justice Stewart, even proposed the abolition of punitive damages.<sup>31</sup> In the view of these Justices, public officials and public figures would have to meet the standards enunciated in *Sullivan*, but people like George Rosenbloom, who did not fit into either category, could recover for genuinely injurious defamation upon a showing of negligence. The restrictions on damages, together with the requirement that some showing of fault be made, were believed sufficient to assure that some "breathing room" would be provided in the delineation of actionable kinds of speech, so that the fear of litigation and the imposition of crushing damages would not inhibit the exercise of the freedoms guaranteed by the first amendment.<sup>32</sup>

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26. 388 U.S. at 146-55.

27. See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 68-69 (1971) (Harlan, J., dissenting); cf. 403 U.S. at 72-78.

28. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

29. 403 U.S. 29 (1971).

30. 403 U.S. at 64 (Harlan, J., dissenting); 403 U.S. at 83-87 (Marshall, J., joined by Stewart, J., dissenting).

31. 403 U.S. at 81-87.

32. See 403 U.S. at 78-87.

## B. *After Rosenbloom: Partial Retreat and Disorder*

### 1. *June 1974: The Gertz and Old Dominion Cases*

The apparent orderliness that had characterized the development of the principles enunciated in *Sullivan* was at least partially destroyed by *Gertz v. Robert Welch, Inc.*,<sup>33</sup> decided by the Court in June 1974. The change in the Court's personnel was certainly responsible, in large measure, for the new tack. Somewhat surprisingly, the newcomers to the Court accepted the Harlan/Marshall suggestion that the required first amendment protections be provided by restricting the scope of recoverable damages rather than by extending the application of the constitutional malice standard articulated in *Sullivan*.<sup>34</sup> Justice Powell, writing for the Court in *Gertz*, declared that the *Sullivan* requirements applied in actions instituted by public officials or public figures against broadcasters and publishers. In actions brought by others against "publishers and broadcasters," however, some showing of fault is all that is necessary to establish liability. But the plaintiff may recover only *actual* damages, unless he can satisfy the constitutional malice requirement of *Sullivan*.

Justice Brennan, dissenting, reaffirmed his *Rosenbloom* plurality opinion<sup>35</sup> that any media discussion of an event of general interest, involving *any individual*, was deserving of the protection provided by the *Sullivan* constitutional malice standard. No other Justice joined his dissent.<sup>36</sup> He was thus no longer able to continue to control the development of the law whose broad outlines he had first mapped out in his opinions for the majority in *Sullivan* and in *Rosenblatt v. Baer*,<sup>37</sup> and whose future course he had attempted to direct in his opinion for the *Rosenbloom* plurality. Predictably, Justice Douglas also dissented, in an opinion that reiterated his view that states are constitutionally prohibited from allowing recovery in libel actions arising out of public discussion of public issues.<sup>38</sup> Chief Jus-

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33. 418 U.S. 323 (1974).

34. 418 U.S. at 345-50.

35. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

36. 418 U.S. at 361. Justice Brennan conceded that *Gertz* was not a public figure, but he argued that, as in *Rosenbloom*, the subject matter was one of public or general interest. Justice Blackmun, who had concurred in Justice Brennan's *Rosenbloom* opinion, indicated that, if a majority of the Court were prepared to accept Justice Brennan's position, he was prepared to continue to adhere to that position as the correct view, but he felt that the need to create a majority for some single position overrode that consideration. 418 U.S. at 353-54. The other member of the Court who concurred with Justice Brennan in *Rosenbloom*, Chief Justice Burger, showed no regret in abandoning that position. 418 U.S. at 354.

37. 383 U.S. 75 (1966), discussed in text at note 23 *supra*.

38. 418 U.S. at 356.

tice Burger<sup>39</sup> and Justice White<sup>40</sup> dissented for a very different reason. In their view Gertz ought to have been allowed the remedy available to him at common law because he was a private figure. Justice White's dissent is interesting because he suggests that the first amendment concerns of the majority can be accommodated by adopting the libel per se/libel per quod distinction,<sup>41</sup> a position with which the *Restatement (Second) of the Law of Torts* had briefly flirted but already abandoned by the time Justice White embraced it.<sup>42</sup>

The difficulties opened up by *Gertz* are apparent. The first arises from the majority's rejection of Justice Brennan's suggestion, in *Rosenbloom*, that mere involvement in a newsworthy event is enough to trigger the applicability of the *Sullivan* standards. As a consequence, in every case involving a plaintiff who is not a public official, the courts must determine whether that plaintiff is a public figure. Involvement in an event of public interest is a factor to be considered<sup>43</sup>—one can involuntarily become a public figure even after *Gertz*—but it is no longer determinative.<sup>44</sup> This concern of the prevailing Justices in *Gertz* for a detailed factual inquiry into whether a person is a public figure for purposes of deciding a libel case echoes a suggestion made by Justice Goldberg, concurring in *Sullivan*.<sup>45</sup> Justice Goldberg asserted that even public officials can have a private aspect to their lives, as to which the constitutional protections enunciated in *Sullivan*<sup>46</sup> do not apply in actions for defamation. There may not be much of a zone of privacy for public officials in this post-Watergate era, but the same cannot be said for public figures who are not officials. *Gertz* even suggests that one may be a public figure for some purposes but not for others,<sup>47</sup> a distinction that can be made with particular force when a purported public figure is not involved in politics or public affairs. Thus, the scope of the protections afforded to a defendant in an action for defamation will depend upon the intricate and often highly subjective determina-

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39. 418 U.S. at 354-55.

40. 418 U.S. at 369-404.

41. 418 U.S. at 374-76.

42. Compare RESTATEMENT (SECOND) OF TORTS § 569 (Tent. Draft No. 12, 1966), with *id.* (Tent. Draft No. 20, 1974).

43. 418 U.S. at 351-52.

44. 418 U.S. at 346.

45. 376 U.S. 254 (1964).

46. 376 U.S. at 301-02 & n.4.

47. 418 U.S. at 351-52 (1974). "Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." 418 U.S. at 352.



tion of not only whether, but also for what purposes, the plaintiff may be considered a public figure.

A second difficulty with *Gertz* is the possibility that different standards for establishing liability may apply depending upon whether the defendant is a "publisher or broadcaster." Each time Justice Powell stated his holding he was careful to insert these words;<sup>48</sup> he must, therefore, have meant to exclude from consideration those situations involving two private citizens who are unconnected with the media. Certainly, Chief Justice Burger, in his dissent, so understood Justice Powell's position.<sup>49</sup> It must be noted, moreover, that Justice Stewart, who has publicly expressed the view that the media are in fact granted special protections by the first amendment,<sup>50</sup> joined in Justice Powell's opinion for the Court. After *Gertz*, therefore, we are left wondering whether an action between private parties is to be governed by the common law. Another unresolved issue is the scope of the constitutional privilege enunciated in *Sullivan* in actions brought by public officials and public figures against nonmedia defendants. Does the privilege apply only when the defendant is one of the media or when the statements in question appeared in the media? Almost all the relevant cases, it should be noted, have fit into these two categories.

As if the confusion that was unleashed by *Gertz* were not enough, on the same day that *Gertz* was announced, the Court handed down its decision in *Old Dominion Branch 496, National Association of Letter Carriers v. Austin*.<sup>51</sup> In that case the three plaintiff letter carriers, who were among a group of fifteen out of 435 who were not members of the local branch of the National Association of Letter Carriers, were described as "scabs" in the union's newsletter and then likened to Esau, Judas, and Benedict Arnold. The newsletter continued by quoting Jack London's definition of a "scab" as a person who was "'a traitor to his God, his country, his family and his class.'" <sup>52</sup> The plaintiffs had recovered substantial damages in the trial court, and the Virginia supreme court had affirmed.<sup>53</sup>

On appeal, the Supreme Court reversed. Presumably, it could have reached this result by following the rationale of *Rosenblatt v.*

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48. See, e.g., 418 U.S. at 347, 348, 350.

49. 418 U.S. at 354-55. Justice Powell's opinion was also interpreted in this fashion in Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975).

50. Stewart, "Of the Press," 26 HASTINGS L.J. 631 (1975).

51. 418 U.S. 264 (1974).

52. 418 U.S. at 268.

53. *Old Dominion Branch 496, Natl. Assn. of Letters Carriers v. Austin*, 213 Va. 377, 192 S.E.2d 737 (1972).

*Baer*<sup>54</sup> and holding that, since the plaintiffs were public employees, their detractors were protected by the *Sullivan* standards. However, the Court, writing through Justice Marshall, did not follow this path, perhaps because, unlike Justice Douglas in *Rosenblatt*, it was not prepared to hold that all public employees were really public officials. Instead, it held that the *Sullivan* standards were applicable because the statements in question were made in the course of what was arguably a "labor dispute."<sup>55</sup> Thus, on the same day that the Court narrowly confined the reach of the constitutional privilege enunciated in *Sullivan* to the category of public figures, it also held that these standards were applicable in a case involving persons far less "public" than Gertz merely because of the context in which the alleged defamation was published. There was no indication whether the *Sullivan* standards might apply to statements in other special contexts.

More constructive, for purposes of clarifying the law of defamation, was the Court's alternate holding in *Old Dominion* that the statements in the newsletter were not actionable because they involved mere expressions of opinion and the use of epithets.<sup>56</sup> In this regard *Old Dominion* is consistent with *Gertz*, in which Justice Powell declared for the Court that statements of opinion that do not amount to false statements of fact are not actionable no matter how pernicious they may be.<sup>57</sup> The Court's pronouncements on this issue in *Old Dominion* and *Gertz* forced the American Law Institute to adopt the position that neither opinion nor ridicule could be made the basis of a libel action, a position that the Institute had expressly

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54. See text at note 23 *supra*.

55. The Court relied on the earlier *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966), which held that defamatory statements made about management officials during a union organizing campaign, although within the jurisdiction of the NLRB, could also be the subject of an action for damages under state law, provided that the *Sullivan* standards were met *and* that actual damages were shown. State actions for defamation were thus not totally preempted by federal labor law. The Court in *Old Dominion* did not allude to the actual damage requirement of *Linn*. It should also be pointed out that not only was the finding of a "labor dispute" in *Old Dominion* much more problematical than in *Linn* but the presence of a truly independent administrative agency was lacking in situations involving federal employees. The closest analogue to the NLRB is the Assistant Secretary of Labor for Labor-Management Relations, but appeal even to this nonindependent administrative officer was almost certainly not available to the plaintiffs in *Old Dominion*. *Old Dominion* has thus gone considerably beyond *Linn*. It should finally be noted that, when *Linn* was decided, the Court had not extended the application of the *Sullivan* standards to cases not involving public officials. Indeed, rather than argue about the scope of the *Sullivan* case, the four dissenters in *Linn* thought the matter was totally preempted by federal law. See 383 U.S. at 67-74.

56. 418 U.S. at 282-87.

57. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

refused to accept less than five weeks prior to the decision of these cases.<sup>58</sup>

In all other respects, however, these two cases only confused what had previously been a fairly orderly development of the constitutional dimensions of the law of defamation. The confusion was underlined, even as to the issues involved in *Old Dominion*, by Justice Powell's dissent in which Chief Justice Burger and Justice Rehnquist joined.<sup>59</sup> The dissenters maintained that the statements in question did not actually concern a "labor dispute" because, for example, the controversy did not appear to be the kind of matter which, if nonpublic employees were involved, could be cognizable by the NLRB.<sup>60</sup> Furthermore, the dissenters argued, these statements were indeed statements of fact; they were not mere opinions or hyperbole.<sup>61</sup>

Such was the state of the law when the Court handed down *Time, Inc. v. Firestone*<sup>62</sup> and *Paul v. Davis* this past term.

## 2. Spring 1976: The Firestone Case

The basic facts of *Firestone* were as follows. Alice Firestone brought a suit for separate maintenance against her husband, Russell Firestone, who was described in Justice Rehnquist's opinion for the Court as "the scion of one of America's wealthier industrial families."<sup>63</sup> He counterclaimed for divorce on the grounds of extreme cruelty and adultery. After a lengthy trial, the Florida trial court granted Russell Firestone's request for a divorce. In rendering his judgment, the trial judge noted that "[a]ccording to certain testimony . . . extramarital escapades of the plaintiff were bizarre and of an amatory nature which would have made Dr. Freud's hair curl. Other testimony . . . would indicate that defendant was guilty of bounding from one bedpartner to another with the erotic zest of a satyr."<sup>64</sup> The trial judge, however, stated that

58. Compare RESTATEMENT (SECOND) OF TORTS § 566 (Tent. Draft No. 21, 1975), with *id.* §§ 566, 567A (Tent. Draft No. 20, 1974). On May 23, 1974, a little over a month before the *Gertz* and *Old Dominion* cases, the American Law Institute by an overwhelming vote rejected a motion to strike sections 566 and 567A as they appeared in the 1974 draft. 1974 PROCEEDINGS, THE AMERICAN LAW INSTITUTE 339.

59. 418 U.S. 264, 291 (Powell, J., dissenting).

60. 418 U.S. at 291-96. The dispute would thus not come within the somewhat analogous, but less formalized, regulatory scheme for federal employees. See note 55 *supra*.

61. 418 U.S. at 291, 296-97.

62. 424 U.S. 448 (1976).

63. 424 U.S. at 450.

64. 424 U.S. at 450-51.

he was "inclined to discount much of this testimony as unreliable," and instead concluded that "*neither party is domesticated.*"<sup>65</sup> He granted the divorce and awarded Mrs. Firestone \$3,000 per month until her death or remarriage. In its issue for the following week, *Time* magazine noted the divorce in its "Milestones" section, which stated that the Firestones had been divorced on the grounds of extreme cruelty and adultery. The article concluded by reporting that "[t]he 17-month intermittent trial produced enough testimony of extramarital adventures on both sides," said the judge, "to make Dr. Freud's hair curl."<sup>66</sup> Alice Firestone then brought a libel action against Time, Inc., in the Florida state courts and recovered a judgment for \$100,000, premised on the conclusion that *Time* had incorrectly asserted that her husband had been granted a divorce upon the grounds of her adultery. In appealing this judgment to the Supreme Court, Time, Inc., contended that the *Sullivan* protections applied to the statements in question and that the Florida courts were thus prohibited by the first and fourteenth amendments from imposing liability on the magazine.

Justice Rehnquist, writing for the Court, rejected the defendant's contention because he had concluded that Mrs. Firestone was not a public figure and the matter was not one of those public controversies that, in themselves, merited application of the *Sullivan* standards. Applying the *Gertz* standards, the Court first found Mrs. Firestone's allegations and proof of humiliation to be a sufficient showing of actual damages to support the jury verdict.<sup>67</sup> However, the Court then determined that the Florida courts, particularly the trial court, had failed to address the question whether *Time* had been at "fault" in the sense described in *Gertz*; accordingly, the judgment was vacated and the case remanded. Justice Brennan dissented, of course, reasoning that "erroneously reporting the results of a public judicial proceeding" was not actionable.<sup>68</sup> Justice Marshall dissented because he thought Mrs. Firestone was a "public figure."<sup>69</sup>

Justice White based his dissent on quite different grounds. He argued that Mrs. Firestone, like Mr. Gertz, should be allowed to pursue her common-law remedy without regard to the notions of fault

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65. 424 U.S. at 451 (emphasis added).

66. 424 U.S. at 452.

67. 424 U.S. at 460. One of the curious aspects of the case is that, on the eve of the trial, Mrs. Firestone dropped her claim for damages for injury to reputation. 424 U.S. at 460. This had the effect of making her action in some ways more like one for injurious falsehood or a false-light invasion of privacy than for defamation. See note 113 *infra*.

68. See 424 U.S. at 471.

69. See 424 U.S. at 484.

that the Court had superimposed upon the common law in *Gertz*.<sup>70</sup> Although Justice White's dissent in *Firestone* was consistent with his dissent in *Gertz*, it was nevertheless inconsistent with the position he had taken in *Rosenbloom*. In *Rosenbloom*, Justice White had refused to join in Justice Brennan's plurality opinion, but he *did* concur in the Court's judgment. His stated reason for doing so was that the case concerned the conduct of public officials, namely the actions and statements of the police in arresting George Rosenbloom on charges of dealing in obscene publications.<sup>71</sup> There is obviously no way that his position in the *Firestone* case, which involved comment on the activities of a Florida trial judge, can be reconciled with the views he held in the *Rosenbloom* case, and he must, therefore, be presumed to have abandoned them *sub silentio*.

The difficulties with the majority opinion in *Firestone* are several. Most obvious is the Court's conclusion that the plaintiff was not a public figure. The majority held that being married to a wealthy man who was a member of a well-known family did not make Mrs. Firestone a public figure. Nor did her activity in the social life of Palm Beach make her one, at least not in a national sense. Finally, the fact that Mrs. Firestone held press conferences during the pendency of the divorce proceedings did not indicate that she had thrust herself into the public eye because, the Court explained, she held these conferences in an attempt to satisfy inquiring reporters.<sup>72</sup> Justice Marshall<sup>73</sup> is not alone in finding the Court's conclusion on these facts questionable, to say the least. A further, more conceptual, difficulty is raised by the majority's intimation that Mrs. Firestone might possibly have been considered a public figure if the inaccurate story had been published in the local press.<sup>74</sup> How would the Court go about defining the geographical borders of a person's "public figuredom"? If Mrs. Firestone were an admittedly public figure in the state of Florida or in a substantial portion of that state, the Court would be hard pressed to justify a holding that she was not to be considered a public figure in a case involving a national publication.

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70. See 424 U.S. at 481. If the *Gertz* requirements of fault were to be accepted, Justice White argued, they should only be applied to cases in which the defamatory matter was published after that decision. 424 U.S. at 482-84.

71. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 58-62 (1971).

72. *Time, Inc. v. Firestone*, 424 U.S. 448, 454 & n.3 (1976).

73. 424 U.S. at 484-90 (Marshall, J., dissenting).

74. 424 U.S. at 453, where there is the concession that Mrs. Firestone might have achieved the requisite notoriety in Palm Beach. "Respondent did not assume any role of especial prominence in the affairs of society, other than perhaps Palm Beach . . . ." Presumably, then, a Palm Beach newspaper would have had the *Sullivan* protections in commenting upon Mrs. Firestone's divorce.

In many ways, however, the most crucial aspect of the Court's decision in *Firestone* was not its refusal to classify Mrs. Firestone as a public figure but its insistence that a divorce proceeding is not a matter of "public controversy."<sup>75</sup> Quoting from *Boddie v. Connecticut*,<sup>76</sup> the Court noted that people are forced to resort to the courts in order to obtain a divorce. The suggestion is very clear: Even a public figure might be able to use the divorce courts without becoming subject to the *Sullivan* standards should he bring an action for defamation for the erroneous reporting of what transpired in those divorce proceedings. It is very disturbing to realize that the Court really means to pursue the position that it had sketched out in *Gertz*. Under the guise of deciding when a person is a public figure, it will be the final arbiter of what can be a matter of legitimate public interest. What had generally been regarded as the discredited portion of Warren and Brandeis' germinal article on privacy<sup>77</sup>—that the courts should inhibit the publication of personal gossip and of trivia—has now apparently been reinstated. One can only describe this development as astounding.

### III. INJURY TO REPUTATION AND THE CONSTITUTION

#### A. *Defamation and the First Amendment*

It is obvious that the accommodation established in *Firestone* and *Gertz* between the first amendment and the individual's interest in the integrity of his reputation will be an unstable one. As we have just noted,<sup>78</sup> courts simply should not, in a free society, take it upon themselves to determine what is newsworthy and what is not. The sheer volume of cases would, as a practical matter, make it difficult for the courts to fill this role even if they were qualified to do so. Moreover, unless the courts are going to become censors, certain areas in which the subject matter will per se be of public interest will have to be carved out; almost anything said in the course of a controversy involving that subject matter will receive the benefit of the *Sullivan* privilege. We have already seen the Court, in *Old Dominion*, identifying anything that could remotely be considered a "labor dispute" as one such area of discourse.<sup>79</sup> Presumably, politics

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75. 424 U.S. at 454.

76. 401 U.S. 371 (1971).

77. Compare Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), with Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966).

78. See text at note 77 *supra*.

79. See text at note 55 *supra*.

and foreign policy will also be included. Perhaps subjects like securities regulation and consumer protection will be treated in this way as well.

Because similar considerations affect whether a person is deemed a public figure, it was formerly difficult for a plaintiff to show that he was *not* a public figure. Indeed, Justice Brennan's solution in the *Rosenbloom* case, which gives the media a virtual carte blanche in deciding what is a matter of general interest, was formulated precisely to avoid having cases turn on the difficult decision of whether a plaintiff is a public figure. These considerations may well pressure the Court to return to the position outlined by Justice Brennan in *Rosenbloom*. It might be noted in this regard that, in March 1975, almost a year after *Gertz* and a year prior to *Firestone*, the Court struck down a Georgia statute that prohibited the public dissemination of the names of rape victims. Only Justice Rehnquist dissented, and he did so on procedural grounds. The Court, in *Cox Broadcasting Corp. v. Cohn*,<sup>80</sup> invalidated the statute because "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."<sup>81</sup> Because the matter was one of "legitimate concern to the public," *Sullivan* would presumably have been applicable in any defamation action that might have arisen if Cox Broadcasting had gotten its facts wrong. If this is so, why are the operations of divorce courts, as in *Firestone*, matters of less "legitimate concern to the public"? If, however, the Court did not mean to imply in *Cohn* that the *Sullivan* standards would have been applicable in a defamation action, what did it mean by using the phrase "legitimate concern to the public"? Justice Rehnquist, in *Firestone*, adopted a restrictive interpretation of *Cohn* by concluding that it protected only accurate reports of judicial proceedings.<sup>82</sup> We are thus faced with one type of "public concern" that provides those exercising their first amendment rights some protections but not others. Then there is a more legitimate "public concern," which the courts will determine on a case-by-case basis, that adds further protections, such as those of *Sullivan*. Nothing more ridiculous nor as restrictive of freedom of speech can be envisaged. The utter inadequacy of the Court's intellectual approach reinforces the original suspicion, premised on the practical difficulty

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80. 420 U.S. 469 (1975).

81. 420 U.S. at 492.

82. *Time, Inc. v. Firestone*, 424 U.S. 448, 455-57 (1976).

of making the necessary factual determinations, that, unless a more drastic solution is adopted, a return to Justice Brennan's *Rosenbloom* solution may be inevitable.<sup>83</sup>

Another difficulty begotten by the *Firestone/Gertz* resolution is the apparent conclusion that, somehow, the first amendment provides greater protection to the media than it grants the rest of us. The textual basis of this proposition is that the first amendment prohibits Congress from making laws "abridging the freedom of speech, or of the press." On the assumption that the drafters of the Bill of Rights would not have used two terms where one would do, the argument concludes that the freedom of the press must in some ways be different from the freedom of speech. Justice Stewart has, of course, openly espoused this view.<sup>84</sup> While *Gertz* and *Firestone* lend some support to this view, the Court had in fact already rejected it in *Branzburg v. Hayes*,<sup>85</sup> on the only occasion when the issue has been specifically addressed. The proposition that freedom of the press is in some ways different from freedom of speech has received

83. Anyone with any doubts is advised to examine one commentator's tortured attempt, at the conclusion of a long historical survey, to synthesize what the Court had done in the period ending with the *Gertz* decision. See Eaton, *supra* note 18, at 1443-51, and particularly at 1448-51. This attempt was made without consideration of the additional complications presented by the conjunction of *Firestone* and *Paul v. Davis*.

The difficulty of making the distinctions required by the *Gertz* case do not, however, seem to trouble one recent writer. See Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEXAS L. REV. 199 (1976). Professor Robertson, it should be noted, does not discuss the public issue complication introduced by the *Old Dominion* case which, as already pointed out, was decided on the same day as *Gertz*. See text at note 51 *supra*. He sees the *Old Dominion* case as one merely involving a "labor dispute," *id.* at 202 n.22, and he cites the lower court decision in the case as a holding that the matter involved was not a "matter of public interest," with the notation "*rev'd on other grounds*." *Id.* at 206 n.50. Eaton, *supra* note 18, does make some slightly greater mention of the *Old Dominion* case, again in footnotes, at 1388-89, 1404-05, and 1448, but he too sees it, and the earlier *Linn v. United Plant Guard Workers Local 114*, 383 U.S. 53 (1966), as merely carving out a labor dispute exception. He does not seem to be troubled with a legal resolution under which speech is freer in the context of a labor dispute than in one of the paradigmatic first amendment situations—political disputes among private citizens.

Colorado, incidentally, adhered to the *Rosenbloom* plurality and rejected the *Gertz* solution in a case involving antique dealers who were neither public figures nor public officials but who came to the public eye by innocently buying some stolen furniture. *Walker v. Colorado Springs Sun, Inc.*, \_\_\_ Colo. \_\_\_, 538 P.2d 450, *cert. denied*, 423 U.S. 1025 (1975) (negligent reporter absolved; judgment upheld against publisher found recklessly to have published other stories about plaintiffs). See also *Aafco Heating & Air Cond. Co. v. Northwest Publications, Inc.*, \_\_\_ Ind. App. \_\_\_, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976). *Contra*, *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292 (1976); *Gobin v. Globe Pub. Co.*, 216 Kan. 223, 531 P.2d 76 (1975); *Stone v. Essex County Newspapers, Inc.*, \_\_\_ Mass. \_\_\_, 330 N.E.2d 161 (Mass. 1975).

84. See text at note 50 *supra*.

85. 408 U.S. 665 (1972).



some distinguished academic support,<sup>86</sup> despite the fact that it is generally accepted that the founding fathers used the terms interchangeably and that when they spoke about freedom of the press they were probably adverting to Blackstone's idea of no "prior restraints," which is really the freedom to publish.<sup>87</sup> Given the Crown's particular harassment of pamphleteers and others who sought to use the printing press to reach a wider audience, this concern was certainly understandable. It is still asserted, however, that, notwithstanding the historical context, the Constitution does use two terms and therefore the Court has a textual basis for distinguishing between the two freedoms. This contention has, I believe, been thoroughly and convincingly refuted by others,<sup>88</sup> and it would serve no purpose for me to rehearse the argument. Whatever theoretical merit the position may have, it will almost certainly flounder in practice when it comes time to decide what is covered by the term "the press."<sup>89</sup> If the *New York Times* is covered, what about *Screw*, another New York publication? Consider too the person who wants to write a book.<sup>90</sup> Will it matter whether this individual is considered a "scholar"? The practical difficulties seem insurmountable.

We have thus far seen that, in order to limit the scope of *Sullivan*'s constitutional privilege, the Court has tried to put some substance in the notions of "public figure" and "newsworthy event"; these are the persons and events with which the public has a "legitimate" concern. When there is no such "public figure" or "newsworthy event," the interest in personal reputation should, in the Court's view, receive greater protection. Nevertheless, to protect the "press," presumed damages will not be allowed *and* some showing of fault on the part of the defendant media will be required. But, as just argued, the distinction between the press and the rest of us will simply not hold up, either on historical or practical grounds. Thus, the Court's concern to limit the scope of the *Sullivan* privilege and to retain as much as possible of the common law of defamation will likely result in a substantial restriction of the common law in all defamation actions, whether brought against the media or not.

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86. See, e.g., Nimmer, *supra* note 49.

87. *Id.* at 640-41. See also L. LEVY, *LEGACY OF SUPPRESSION* (1960); Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 88-99 (1975).

88. See Lange, *supra* note 87. But see Nimmer, *Speech and Press: A Brief Reply*, 23 UCLA L. REV. 120 (1975).

89. See Lange, *supra* note 87, at 99-107.

90. Cf. *United States v. Doe*, 460 F.2d 328 (1st Cir.), *cert. denied*, 411 U.S. 909 (1972). In this case, Popkin, an assistant professor at Harvard, was denied any privileges not enjoyed by citizens at large to refuse to answer questions before a grand jury concerning the leakage of the "Pentagon Papers."

To this extent, the fears of Justice White, who dissented in *Gertz* and *Firestone*, seem well-founded. Furthermore, as argued previously,<sup>91</sup> the basis upon which the Court in *Gertz* and *Firestone* concluded that neither public figures nor newsworthy events were involved in those cases seems suspect. Many reasonable people would have reached the opposite conclusion on the facts of both those cases. The Court will, so it seems, be under pressure to move back to the *Rosenbloom* plurality position, that public figures and newsworthy events can themselves be created by the attention of the media and the often ephemeral curiosity of the public, even when triggered by false reports. By recognizing the existence of areas of public interest in the *Old Dominion* case, the Court has already acknowledged, and I think correctly, that whether or not an issue or controversy is of legitimate public concern is, in at least some areas, a matter upon which the presumption must run in favor of the speaker, regardless of whether he can be characterized as a member of the media.

In short, my contention is that, far from providing a firm base for the continued existence of the common-law action of defamation, the Court, in its recent decisions, has now arrived at a point where, practically speaking, no plaintiff will be able to recover in an action for defamation or any other injurious falsehood unless he can show actual damages and fault. Furthermore, on a large range of issues, which will inevitably expand, there will be no recovery absent a *Sullivan* showing of actual malice, regardless of who the defendant is, although as a practical matter it may be easier for a so-called media defendant to invoke the protection of the *Sullivan* doctrine than for a mere "private person" to do so.

#### B. *Constitutional Redress for Injury to Reputation by Public Officials*

If the law of defamation will become increasingly unable to provide relief to a person whose reputation has been damaged by the publication of falsehoods, are there any other legal remedies to which he may turn for redress? Certainly falsehoods circulated by public officials involve state action. It would have been reasonable to expect that, at least in some circumstances, an individual might obtain relief in the federal courts under section 1983<sup>92</sup> in cases involving state officials, and under the doctrine established in *Bivens*

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91. See text at note 72 *supra*.

92. 42 U.S.C. § 1983 (1970).

v. *Six Unknown Named Agents*,<sup>93</sup> in cases involving federal officials. As we have already seen, however, the Court foreclosed this possibility in *Paul v. Davis*. That decision is in some ways an odd one. Admittedly, *Wisconsin v. Constantineau*,<sup>94</sup> the case that is closest to *Paul v. Davis* on its facts, is distinguishable because posting Constantineau as a drunk prevented her from buying liquor. No such immediate consequence necessarily flowed from the flyer circulated in *Paul v. Davis*, although there was some evidence that being named in the flyer caused Davis some difficulty with his employer.<sup>95</sup> But there are some recent cases dealing with injury to the reputation of private citizens caused by public officials that are not so easily distinguished, even if they are not so obviously analogous to *Paul v. Davis* as is *Wisconsin v. Constantineau*. For example, in *Board of Regents v. Roth*,<sup>96</sup> the one-year contract of a young faculty member at Wisconsin State University-Oshkosh was not renewed. Roth, the faculty member, claimed that due process required that he be given a statement of reasons, but the Court, writing through Justice Stewart, disagreed. The state had done nothing "that might seriously damage his (Roth's) standing and associations in his community."<sup>97</sup> It had not, for example, charged him with dishonesty or immorality. Had it done so, "due process would accord an opportunity to refute the charge . . . ."<sup>98</sup> Justice Stewart then declared:

In the present case, however, there is no suggestion whatever that the respondent's "good name, reputation, honor, or integrity" is at stake.

Similarly, there is no suggestion that the state, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.<sup>99</sup>

Yet in *Paul v. Davis*, the plaintiff had been stigmatized by the flyer identifying him as a shoplifter, and his employment opportunities were probably seriously restricted—as evidenced by his employer's annoyance—even if they were not completely foreclosed. It would

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93. 403 U.S. 388 (1971).

94. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

95. *Paul v. Davis*, 424 U.S. 693, 696 (1976). As a result of the flyer, Davis was called in by his supervisor and, although not fired, was told that "he 'had best not find himself in a similar situation' in the future."

96. 408 U.S. 564 (1972).

97. 408 U.S. at 573.

98. 408 U.S. at 573.

99. 408 U.S. at 573. In *Bishop v. Wood*, 96 S. Ct. 2074 (1976), decided a few months after *Paul v. Davis*, one of the reasons given for denying relief against city officials to a fireman discharged from his job was that, because there had been no public disclosure of the grounds for his being discharged, proof was lacking that he had been so stigmatized as to hurt his chances of future employment. 96 S. Ct. at 2079.

seem, then, that the Court in *Paul v. Davis* was willing to overlook the very effects on an individual's reputation that had concerned Justice Stewart in *Roth*.

The result in *Paul v. Davis* is even more difficult to reconcile with *Jenkins v. McKeithen*,<sup>100</sup> where the Court upheld a constitutional attack, based on the failure to grant petitioner adequate procedural protections, against a Louisiana Labor-Management Commission authorized to make public findings that particular people were engaged in violations of Louisiana or United States criminal laws dealing with labor-management relations. The Court held that the state could not stigmatize people in this way without affording them substantial procedural protections. Particularly noteworthy, for our purposes, is the absence of any allegation or proof on the record that the potential stigmatization of Jenkins would have foreclosed any particular employment opportunities for him.

I leave for others the task of reconciling *Paul v. Davis* with *Roth* and *Jenkins v. McKeithen*, although I suspect that it will be difficult to produce a convincing reconciliation. Rather, accepting for the moment that there are adequate bases for distinguishing the cases, we must ask what effect the Court's decision in *Paul v. Davis* will have on the individual's right to seek redress for injury done by public officials to his reputation. As already noted, Justice Rehnquist assumed that the conduct Davis complained of was tortious under state law.<sup>101</sup> Justice Rehnquist's point was that not every tort committed by a public official gives rise to a cause of action based upon a deprivation of constitutional rights, an assertion that is probably correct but does not prove much. The question is whether Justice Rehnquist was correct in assuming that Davis might have a tort claim under state law. Consider, for instance, the relatively well-established principle that, were Davis complaining of the actions of federal law enforcement officials, he would have no state cause of action for defamation. The case would be squarely governed by *Barr v. Matteo*<sup>102</sup> and the absolute privilege it granted federal officials for statements within the outer perimeters of their duty. Warning shopkeepers of suspected shoplifters is well within the outer perimeters of the duties of law enforcement officials. Similarly, the states almost uniformly grant at least a qualified privilege to their own officials under these circum-

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100. 395 U.S. 411 (1969).

101. *Paul v. Davis*, 424 U.S. 693, 697-99 (1976).

102. 360 U.S. 564 (1959). For an instance where the attempt to bring such an action against a federal law enforcement official was summarily dismissed, see *Scherer v. Morrow*, 401 F.2d 204 (7th Cir. 1968), *cert. denied*, 393 U.S. 1084 (1969).

stances,<sup>103</sup> and there is some tendency in the state courts to follow federal law and grant to relatively high-ranking administrators, like police chiefs, the absolute privilege previously granted only to governors and other senior officials.<sup>104</sup> Indeed, the Court's decision in *Sullivan* was at least partially based on the assumption that the public official who had sued for defamation was himself protected by a doctrine like that enunciated in *Barr v. Matteo* from a defamation action for statements in his official capacity unless, at the very least, the private citizens were able to show "actual malice."<sup>105</sup>

In sum, Davis was denied a remedy under the Constitution because, the Court said, he had a remedy under state law. But suppose a person like Davis does not have such a remedy, as he may well not, particularly against a federal law enforcement official. Is he to go remediless? Moreover, as we have just seen, the Court's activities in the field of defamation are quite possibly rendering illusory the availability of any potential action for defamation. At the very least, a plaintiff will have to show actual damages and prove negligence, but even that may not be enough. Given any substantial public interest in the subject matter, proof of intentional falsehood or reckless disregard of truth may be necessary, in accordance with the reasoning in *Old Dominion*,<sup>106</sup> to recover anything at all. Moreover, there will be inexorable pressure—so long as a double standard is used—to extend the *Sullivan* standards to new classes of plaintiffs, either because the event in question is newsworthy or because, for some limited purpose, plaintiff is a public figure.

The law clearly cannot remain in such an unsatisfactory, as well as confusing, state for very long. Unless substantial changes are made in the law of defamation or remedies are granted under other state and federal statutes, there will be constant requests to re-examine *Paul v. Davis* and to grant a constitutionally based cause of action, either under section 1983, against state officials, or under the

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103. See RESTATEMENT (SECOND) OF TORTS §§ 591, 598A (Tent. Draft No. 20, 1974).

104. See *Lombardo v. Stokes*, 18 N.Y.2d 394, 222 N.E.2d 721 (1966) (president of municipal college, *semble*). RESTATEMENT (SECOND) OF TORTS § 591, Comment c (Tent. Draft No. 20, 1974), asserts that several states have followed federal law and extended the absolute privilege to all employees however minor but that "the greater number of state courts have refused to make this extension." However, all but three of the cases proffered as support for the statement antedated *Barr v. Matteo*. *Id.* at 184-85. In fact most of the cases cited were decided before 1920. On the other hand, the five cases cited in which the extension was made were all decided after 1950.

105. *New York Times Co. v. Sullivan*, 376 U.S. 254, 282-83 (1964).

106. See notes 51-61 *supra* and accompanying text.

*Bivens* doctrine, against federal officials.<sup>107</sup> But, should the Court move in this direction, it will be faced with two additional problems. First, such a doctrinal resolution would be tantamount to overruling *Barr v. Matteo*, and, second, it would be a partial overruling of *Sullivan*. The reason for this second effect is that, under *Wood v. Strickland*<sup>108</sup> and *Scheuer v. Rhodes*,<sup>109</sup> a defendant in a civil rights action can successfully defend himself against an otherwise valid claim if he both acted in good faith *and* had an objectively reasonable basis for his action. If he lacked an objectively reasonable basis for his actions, however, he would almost certainly be negligent and would therefore be subject to liability. Accordingly, to grant the civil rights action for injury to reputation would be, in effect, an adoption of the *Gertz* requirements of fault and actual damages in all actions against public officials, even if they are brought by public figures, unless the Court divides the universe of civil rights actions into a class based on good faith and negligence on the one hand, and a class based on intentional or reckless conduct on the other. If the *Gertz* requirements are applied to all actions against public officials, however, it will be easier for a public figure to bring an action against a public official than against other potential defendants, since the latter would, presumably, still be protected by *Sullivan*. From the Court's point of view, these problems may well seem insoluble.

#### IV. CONCLUSION

The law in the area of injury to reputation is on the verge of chaos. Attempts by the Court to eliminate confusion have almost invariably increased it.<sup>110</sup> The underlying reason for these difficulties is likely traced to the fundamental assumption in *Sullivan* that it is possible to have different standards of liability depending on who is involved or, as the later cases have demonstrated, on what is involved. The result has been to put tremendous pressure on the fact-finding process, which is asked to make largely subjective determinations, such as who is a public fig-

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107. Cases like *Imbler v. Pachtman*, 424 U.S. 409 (1976), will only increase the pressure for some sort of remedy against official actions injuring reputation. In *Imbler* it was held that no action under section 1983 could be brought against a prosecuting attorney for the knowing use of false testimony against an accused. Accordingly, there will be a strong urge to give citizens at least a remedy against extra-judicial statements. It must not be forgotten that, in *Monroe v. Pape*, 365 U.S. 167, 173 (1961), the Court expressly stated that one of the purposes of section 1983 was to provide a federal remedy when those afforded under state law were inadequate.

108. 420 U.S. 308 (1975).

109. 416 U.S. 232 (1974).

110. See note 83 *supra*.

ure and what is newsworthy. These questions are rehashed by judges when they decide the supposed question of law, "what is a matter of legitimate public concern or interest." The system is simply incapable of making these determinations in a consistent and intellectually satisfying manner. The most feasible options are either to apply the *Sullivan* criteria to all types of defamation or to apply the *Gertz* requirements of fault, in the form of mere negligence and actual damages, to all types of defamation. The latter alternative would, of course, require the Court to repudiate the distinctions, such as those between public and private figures and matters of legitimate and illegitimate public concern, that formed the basis of the reasoning presented to support its actual decision in *Gertz*. While I cannot deny the personal attractiveness of applying the *Sullivan* criteria to all situations, I am prepared to hazard a guess that the across-the-board application of the *Gertz* standards is more likely.<sup>111</sup> Of course, as *Gertz* itself recognized, a plaintiff who can demonstrate constitutional malice as defined in *Sullivan* may be able also to recover punitive damages. But he will not have to meet those standards to recover his actual damages, which, under *Gertz*, include humiliation and mental suffering, as well as pecuniary loss.

My reasons for reaching the conclusion that the Court will follow this approach are partially based on the need to meet the problem uncovered by *Paul v. Davis*. Redress must be given, whether under the guise of a civil rights action or an action for defamation, when public officials injure the reputations of citizens by issuing false statements. In this regard, I am inclined to believe that *Barr v. Matteo* will be overruled, or at least substantially modified. Another reason to believe the Court will be obliged to generalize the *Gertz* solution to cover all cases of injury to reputation is the Court's gradually increasing awareness that many of the traditional methods of distinguishing among types of speech do not make much sense. For example, the distinction between commercial and noncommercial speech is breaking down,<sup>112</sup> as well it should. Freedom of speech is, after all, of concern in commercial as well as in other contexts.<sup>113</sup> Similarly, in

111. That is, to make my position absolutely clear, the Court will have to retreat from its assertion in *Gertz* that the *Sullivan* standards still apply in actions brought by public officials or public figures. As previously noted, see text at notes 84-90 *supra*, the Court will also have to retreat from its completely untenable intimation in *Gertz* that the old common law of defamation may still apply in cases brought by private citizens against other, nonmedia, private citizens. On this latter point, Eaton, *supra* note 18, at 1450, suggests that the Court will have to abandon its intimation in *Gertz*, but he refuses to take a clear stand on the issue.

112. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 96 S. Ct. 1817 (1976).

113. On May 19, 1976, the American Law Institute, in adopting a proposed

the field of injury to reputation, injurious falsehood in the broad sense is actually the issue. It is pointless to develop a system in which an admittedly injurious false statement is or is not actionable depending solely on whether it would have been considered defamatory at common law, or whether it would fit into the narrow category of injurious falsehood at common law because it amounted to slander of title or disparagement of property. Indeed, the fact that the most frequently litigated category of slander per se is injury affecting business and professional relationships evidences this inability to confine the law of defamation within its historical mold.<sup>114</sup> Until recently, an observer would have been fairly confident in predicting that a janitor who was called a "dead-beat who never paid his bills" could probably not have been able to succeed in an action for slander.<sup>115</sup> In our modern society, where a person who is unable to purchase a car on credit cannot drive to work and where civil service regula-

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§ 623A, *Liability for Publication of Injurious Falsehood*, for the RESTATEMENT (SECOND) OF TORTS, expressly noted that the constitutional defenses applied to all injurious falsehoods, including those that related solely to commercial matters, and not merely those that were defamatory (personal recollection of author confirmed by correspondence with the Reporter, Dean Wade). In this regard, it should be pointed out that in *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976), the plaintiff had withdrawn her claim for damages for injury to reputation shortly before the trial. This made her claim somewhat like a common-law action for injurious falsehood, except for the fact that her damages probably did not constitute "pecuniary loss," a usual requirement in the traditional injurious falsehood case. See RESTATEMENT (SECOND) OF TORTS § 623A (Proposed Draft May 19, 1976). This circumstance again shows that the eventual resolution of the major policy issue involved here cannot consist merely of a rearrangement of narrow common-law remedies. A more general solution will be necessary. The fact that Mrs. Firestone withdrew her claim for damages for injury to reputation also makes her case somewhat analogous to the "false light" invasion of privacy cases in which plaintiff seeks redress for nondefamatory falsehoods. See *Time, Inc. v. Hill*, 385 U.S. 374 (1967). See also *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974). The problem with this rationale in Mrs. Firestone's case is that the matter of which she complains—a false accusation of having been divorced for adultery—is clearly defamatory. Of course, as Justice Rehnquist pointed out, the fact that Mrs. Firestone was prepared to waive one item of damages found in most defamation actions does not necessarily mean, as a logical matter, that her cause of action was not in fact one for defamation. 424 U.S. at 460. These circumstances are a further indication of the need for a general solution.

114. Compare the comments and citation of case authority accompanying RESTATEMENT (SECOND) OF TORTS § 573 (Slandorous Imputations Affecting Business, Trade, Profession or Office) (Tent. Draft No. 20, 1974), with those accompanying § 571 (Slandorous Imputation of Criminal Conduct), § 572 (Slandorous Imputation of Loathsome Disease), and § 574 (Slandorous Imputation of Sexual Misconduct). The comments accompanying § 573 note the large number of cases and the impossibility of narrowly confining the range of situations that may be covered.

115. See *Liebel v. Montgomery Ward & Co.*, 103 Mont. 370, 62 P.2d 667 (1936) (stenographer in a law office falsely accused of not paying her debts has no cause of action); *Hudson v. Pioneer Serv. Co.*, 218 Ore. 561, 346 P.2d 123 (1959) (same as to logger accused of being a delinquent debtor). The classic case at common law denying recovery was that of a clerk of a gas company accused of consorting with "whores." *Lumby v. Allday*, 148 Eng. Rep. 1434 (Ex. 1831).



tions require civil servants to refrain from "dishonest . . . or notoriously disgraceful conduct,"<sup>116</sup> this prediction no longer can be made with any certainty. The evolving modern view is that the actual capacity of the falsehood to injure is the crucial factor in determining whether a statement is actionable, and not the largely academic determination of whether the statement would have been actionable in the nineteenth century.

We thus have a situation where an individual's interest in freedom of speech, which is guaranteed him by the Constitution, clashes in many instances with the expanding interest of another individual in the integrity of his reputation. This latter interest was denied protection in *Paul v. Davis*, but it was recognized as worthy of constitutional protection in *Roth* and *McKeithen*. Indeed, *Firestone* and *Gertz* are themselves cases where this interest prevailed over a defendant's interest in free speech. However appealing *Sullivan's* partial resolution of the conflict might be, there is no way of confining that holding to similar situations and preventing its expansion to practically the whole field of injurious falsehood, which now includes areas that were once denied first amendment protection because they were considered commercial speech. At the same time, it does not appear that the Court or our society is prepared to abandon its concern for the protection of the individual's reputation. The only way to accommodate all the conflicting interests in a manner that is socially acceptable, therefore, will be to generalize the *Gertz* negligence and actual damage solution.

There are many who may regret this resolution but, after *Sullivan* and its progeny, there is no returning to the other possible means that might have been used to deal with the very real abuses of the common law of defamation, such as tighter control of damages,<sup>117</sup> stricter attention to the adequacy of the colloquium,<sup>118</sup> and, above all, more common sense standards relating to what is substantial truth<sup>119</sup> and the frank recognition, without the necessity of prompting by the Supreme Court, that mere statements of opinion carrying no false factual impli-

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116. See 5 C.F.R. § 731.202(b)(2), as amended, 40 Fed. Reg. 28,047 (1975).

117. In the United Kingdom, for example, the House of Lords has materially cut down on the ability of plaintiffs to secure punitive damages. *Rookes v. Barnard*, [1964] A.C. 1129, 1 All E.R. 367, a decision that was applied to cases of defamation. See *Cassell & Co. v. Broome*, [1972] A.C. 1027, 1 All E.R. 801.

118. This is the part of the complaint in an action for defamation that alleges and shows that the statements were made about the plaintiff. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 288-92 (1964), an alternative holding was that no reasonable man could conclude that the defamatory statements involved in that case were made about the plaintiff.

119. In the *Sullivan* case, the Court flirted with the possibility of declaring that the advertisement in question was substantially true as a matter of law. 376 U.S. at

cations are not actionable.<sup>120</sup> One advantage of the present suggestion for the Court's resolution of its self-generated dilemma is that it will open the way for the abandonment of the libel/slander distinction and the concomitant distinction, made in many states, between libel per se and libel per quod. Unless recklessness can be shown, actual damages will be required, but the arcane learning on what constitutes "special damages" could become a matter of interest only to historians.<sup>121</sup> Future law students would then be spared the time spent wondering why the refusal of a person's fiancée to marry him might constitute special damages<sup>122</sup> (although not in the present day constituting a particularly grievous form of economic loss), while a \$10,000 doctor's bill for a nervous breakdown does not.<sup>123</sup>

289. A good argument could be made that on the facts presented in *Sullivan* the English courts would have sustained a defense of truth. See J. SALMOND, *TORTS* 160-61 (16th ed. R. F. V. Heuston 1973).

120. This approach would have required repudiation of the positively ridiculous position, embraced by the American Law Institute as recently as 1974, that mere opinion and even ridicule, unaccompanied by defamatory factual implications, could be actionable. See note 58 *supra*. In commenting on *RESTATEMENT OF TORTS* § 566 (1938), Professor Arthur Goodhart wrote,

Illustration (1) . . . is rather a strange one. It holds that to state of a political opponent who has blocked reform measures that he "is no better than a murderer" is defamatory. It is probable that the English courts would hold that this was merely a form of abuse, and therefore not actionable. American political controversies must be conducted on a very high level if such a remark is held to fall within the law of defamation.

Goodhart, *Restatement of the Law of Torts, Volume III: A Comparison Between American and English Law*, 89 U. PA. L. REV. 265, 283-84 (1941). Professor Goodhart's view is borne out by the subsequent case of *Slim v. Daily Telegraph Ltd.*, [1968] 2 Q.B. 157, 1 All E.R. 497 (C.A.). Professor Goodhart also commented, in a similar vein, on the position in section 601 of the *Restatement* "that a conditional privilege is lost if the maker of the statement, although believing the defamatory matter to be true, has no reasonable grounds for so believing." *Id.* at 289. Again, subsequent decisions have supported Goodhart's assertion that English law takes what I would call a more common-sense approach to the matter. See *Horrocks v. Lowe*, [1975] A.C. 135, 1 All E.R. 662 (so long as statement is believed in, it is privileged no matter how unreasonable or prejudiced). For a very recent discussion that places major emphasis on the question of defamatory opinion in English and American law, see Keeton, *Defamation and Freedom of the Press*, 54 TEX. L. REV. 1221 (1976).

121. I am assuming that the state courts, when confronted with the need to find actual damages in all cases of defamation, as well as other cases of injurious falsehood, will not insist on creating a sub-category of situations in which not only actual damages but special damages, as that term is understood at common law, are required. Of course, where the falsehood is not defamatory, *i.e.*, has no apparent effect on a person's reputation, the states may insist on a showing of pecuniary loss because otherwise there may be no showing of actual harm. It should be pointed out, however, that "special damages" at common law is a more restrictive term than pecuniary loss. See text at notes 122-23 *infra*.

122. See *Moody v. Baker*, 5 Cow. (N.Y.) 351 (1826).

123. See *Terwilliger v. Wands*, 17 N.Y. 54 (1858).